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No. —300

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HULLEY, ET. AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

J. LEE RANKIN,
Solicitor General,
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In the Supreme Court of the United States

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v.

E. B. HULLEY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The findings of fact, opinion, and decree of the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County (Appendix A, *infra*, pp. 10–17) are not officially reported. The opinion of the Supreme Court of Florida (Appendix A, *infra*, pp. 17–18) is reported at 102 So. 2d 599.

JURISDICTION

The judgment of the Supreme Court of Florida (Appendix A, *infra*, p. 18) was entered on April 16, 1958. (R. 273.) A petition for rehearing was denied on May 27, 1958. (R. 278.) The jurisdiction

that all the mechanic's liens were superior to the tax lien and ordered the sum held by the master to be distributed to the mechanic's lienors on a *pro rata* basis. (R. 236–240; Appendix A, *infra*, pp. 16–17.)

On appeal, the United States pressed its claim but the trial court's order was affirmed *per curiam* by the Supreme Court of Florida, citing only its prior decision in *United States* v. *Griffin-Moore Lumber Co.*, 62 So. 2d 589 (Fla.). (R. 272; Appendix A, *infra*, p. 18.)

REASONS FOR GRANTING THE WRIT

The federal tax liens involved here arose before the taxpayer incurred the indebtedness constituting the basis of the mechanic's liens, and in fact arose even before the "visible commencement" of operations for the improvement of the property. In addition, the federal liens were recorded before any of the mechanic's liens was recorded (except one) and before any of the mechanic's liens was perfected (by judgment or otherwise). On both grounds, therefore, the decision of the Florida Supreme Court, holding that the mechanic's liens are entitled to priority over the federal liens, is in direct conflict with numerous decisions of this Court.

In view of this conflict, and in view of the continuing importance of the question presented,[1] we submit

[1] While the federal liens here involved arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939 (Appendix B, *infra*, p. 19), the Internal Revenue Code of 1954 reenacts these provisions without substantive change. See Sections 6321, 6322, and 6323 of the 1954 Code; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406–A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575–576.

that review and reversal of the decision below are fully warranted in order to preserve uniformity in the federal scheme of taxation. See *United States* v. *Gilbert Associates*, 345 U. S. 361, 364.

1. Even in the case where a mechanic's lien is recorded before the federal lien arises, this Court has held that the federal lien takes first if additional steps are necessary to perfect the mechanic's lien. *United States* v. *Colotta*, 350 U. S. 808, summarily reversing 79 So. 2d 474 (Miss.); *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, summarily reversing 227 F. 2d 359 (C. A. 7th); *United States* v. *Vorreiter*, 355 U. S. 15, summarily reversing 134 Colo. 543.[2]

The decision below is not only in conflict with those holdings, but goes considerably further; for, as already noted, the federal liens in the instant case arose before the state mechanic's liens arose and, furthermore, were recorded before the mechanic's liens (except one) were recorded. Thus, the question of priorities can be decided simply upon the basis of the elementary principle enunciated by this Court in *United States* v. *New Britain*, 347 U. S. 81, 85, that "the first

[2] These decisions applied the rationale of *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, that the effect of a local statutory lien in relation to the federal tax lien is always a federal question; that a prior inchoate lien under state law cannot take preference over a subsequent federal tax lien; and that the local lien remains inchoate, and unperfected in this sense, while it is "contingent upon taking subsequent steps for enforcing it" (340 U. S. at 51). This rationale was also reaffirmed in *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; and *United States* v. *Scovil*, 348 U. S. 218. See also *United States* v. *New Britain*, 347 U. S. 81, 86.

in time is the first in right." Application of this principle requires a reversal of the decision below, even apart from the rationale of the *Colotta, White Bear,* and *Vorreiter* decisions, *supra.*

2. Beyond question, the federal liens arose on December 2, 1952, and January 7, 1954, when assessments against the taxpayer were received by the District Director of Internal Revenue (R. 124, 126).[3] These dates are not only prior to the time that the indebtedness to the mechanic's lienors was actually incurred, but are even prior to the "visible commencement" of operations for the improvement of the land (March 11, 1955); under Florida law, mechanic's liens "relate back" to the latter date (Appendix B, *infra,* p. 20). Thus, even assuming *arguendo,* contrary to this Court's decisions (*e. g., United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, 50), that the doctrine of "relation back" has any application as against federal liens, the mechanic's liens would still be subsequent in time to the federal liens.

Aside from the four categories of lienors specifically excepted by Section 3672 (Appendix B, *infra,* pp. 19–20)—mortgagees, pledgees, purchasers, and judgment creditors—a lien which arises subsequent in time to a federal tax lien is clearly not entitled to priority over

[3] Sections 3670 and 3671 of the Internal Revenue Code of 1939 (Appendix B, *infra,* p. 19), corresponding to Sections 6321 and 6322 of the 1954 Code. The reference in the findings and opinion of the trial court to the federal lien as being "dated May 13, 1955" is misleading. The *notice* of the federal lien was admittedly "dated May 13, 1955," but the lien itself, under the express terms of Section 3671 of the 1939 Code, arose when assessments against the taxpayer were received by the District Director.

the federal lien. *United States* v. *New Britain, supra.*[5] And, since none of the mechanic's liens had been reduced to judgment prior to the recording of the federal liens, Section 3672 is inapplicable here.[4] Indeed, apart from Glow's lien (recorded May 10, 1955), none of the mechanic's liens had even been recorded (May 20, June 2, 7, 9, 10, and August 8) prior to the recording of the federal liens (May 16, 1955).

3. The court below, though fully apprised of the applicable decisions of this Court (*supra,* p. 5), nevertheless refused to follow them and affirmed the decision of the trial court solely on the basis of its prior decision in *United States* v. *Griffin-Moore Lum-*

[4] The four categories of Section 3672 are to be defined according to the conventional meaning of the terms. See *United States* v. *Scovil*, 348 U. S. 218, 221 ("purchaser"); *United States* v. *Gilbert Associates*, 345 U. S. 361, 364–365 ("judgment creditor"). See also *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 52 (concurring opinion of Mr. Justice Jackson).

[5] There is no question here concerning the relative priority of the mortgages and the federal lien (see the Statement, *supra*, p. 3). Since all three mortgages were perfected prior to the recording of the federal lien, the courts below correctly applied Section 3672 in subordinating the federal lien to that extent. Compare *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587. Contrary to the suggestion of the trial court (Appendix A, *infra*, p. 13), however, the Government's concession that its tax lien is inferior to the third (Lewis) mortgage, which the trial court held inferior to the mechanic's liens, is not "a paradox." See *United States* v. *New Britain*, 347 U. S. 81, 88: "The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien."

ber Co., 62 So. 2d 589 (Fla.). In that case, it was held that, where a mechanic's lien arose and was recorded prior to the time federal tax liens were recorded, the mechanic's lien was entitled to priority. That decision is plainly inapposite here since, as we have pointed out, the mechanic's liens involved in this case arose subsequent in time to the federal liens and (with one exception) were recorded subsequent to the recording of the federal liens.[5]

CONCLUSION

The question presented has been authoritatively settled by this Court in several decisions. Under those decisions, the decision below is clearly erroneous. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted and the

[5] Moreover, the *Griffin-Moore Lumber Co.*, decisions is irreconcilable with the later decision by this Court in *United States* v. *White Bear Brewing Co.*, *supra*. This was apparently recognized by the trial court, which stated that it was "compelled to agree with the principles enunciated by * * * dissenting opinion of Mr. Justice Douglas" in *White Bear* (Appendix A, *infra*, p. 14).

The trial court purported to apply the principle of "first in time, first in right," but in doing so it compared dates having no common denominator. The court (Appendix A, *infra*, p. 15) held that the mechanic's liens were superior because the date on which they *arose* (under Florida law) was prior to the date on which the federal lien was *recorded*. But if the date on which the mechanic's liens *arose* is to be used in applying the principle of "first in time, first in right," then surely the date on which the federal lien *arose* must also be used; and in that event application of the principle requires priority for the federal lien. *Supra*, pp. 5–6. A similar result would follow (except as to Glow's lien) if the date of recording were deemed the critical date for comparative purposes.

judgment reversed without oral argument or further briefs.[6]

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
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EARL E. POLLOCK,
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A. F. PRESCOTT,
GEORGE F. LYNCH,
Attorneys.

AUGUST 1958.

[6] This was the disposition of the *Colotta*, *White Bear*, and *Vorreiter* cases, *supra*, p. 5.

Appendix A

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, in and for Pinellas County

Chancery #43418

Gulf Beach Bank, a Florida Banking Corporation, plaintiff

v.

E. B. Hulley and Bess M. Hulley, His Wife, et al., defendants

Filed July 13, 1956

Avery W. Gilkerson,
Clerk, Circuit Court,
Deputy Clerk.

DECREE

This cause coming on to be heard upon the complaint herein filed by the plaintiff, the answers and cross claims of the various parties defendant, including the answer of the United States of America, the testimony and documentary proof adduced as disclosed by the record, the report of E. B. Ellis, Esq., as Special Master appointed by this Court, objections to report of Special Master and Motion for entry of final decree, the brief submitted by the United States of America though the United States Attorney for the Southern District of Florida, the brief of Harold C. Anderson Lumber Company, Inc., a Florida corporation, one of the defendants, filed on its own behalf and on behalf of other defendants mechanic lienors, the arguments of an Assistant United States Attorney for the Southern District of Florida and Counsel for the defendants who hold mechanics' liens

upon the property which is the subject of this action, and the Court being advised in the premisies,

THEREUPON, THE COURT DOTH MAKE THE FOLLOWING FINDINGS OF FACT, TO-WIT:

FINDINGS OF FACT

(*a*) The first materials were delivered upon the subject property by the defendant, Harold C. Anderson Lumber Company, Inc., on March 11, 1955, which delivery constituted the visible commencement of operations for the improvement of subject lands.

(*b*) Mechanics' liens were filed in the office of the Clerk of the Circuit Court in and for Pinellas County, Florida by the various defendants in the amounts hereinafter set forth on the following dates.

C. Glow	May 10, 1955	$92.70
Harold C. Anderson Lumber Co., Inc.	May 20, 1955	3,266.88
R. Malcolm Whitworth	June 2, 1955	127.00
Burford Distributing Company	June 7, 1955	453.04
Albert Sherouse	June 9, 1955	265.00
John H. Squires	June 10, 1955	700.00
Jerome P. Dodge	August 8, 1955	356.00

(*c*) The United States of America filed its tax lien in the sum of $8,539.10 in the office of the Clerk of the Circuit Court in and for Pinellas County, Florida, on May 16, 1955, said lien being dated May 13, 1955.

(*d*) All of said claims of lien were filed for record, as aforesaid, within three months after the final performance of labor or final furnishing of materials by the respective lienors.

(*e*) All of said mechanics' liens relate back to and became a lien upon the subject property effective as of the time of visible commencement of operations for the improvement of the subject land, to-wit: March 11, 1955, as provided by Section 84, Florida Statutes.

(*f*) The claim of lien of C. Glow was filed of record on May 10, 1955. All other liens herein described

were filed subsequent to May 16, 1955, the date of filing of the lien of the United States.

(*g*) All cross-claims in this action for the enforcement of mechanics' liens were filed within one year after the respective claims of lien were filed for record in the office of the Clerk of the Circuit Court in and for Pinellas County, Florida.

(*h*) The third mortgage of the cross-claimant, James O. Lewis, was executed April 13, 1955, and was recorded in the office of the Clerk of the Circuit Court in and for Pinellas County, Florida, on April 14, 1955, subsequent to the date of visible commencement of operations for the improvement of the subject lands, as a result whereof said mortgage is inferior and subject to said mechanics' liens.

(*i*) M. P. Effross and Dorothy Effross, his wife, are the owners and holders of a second mortgage recorded March 11, 1955, on which there was due $600.00 principal, $30.00 interest and $150.00 attorney's fee. Said mortgage was determined to be paramount to all mechanics' liens and the tax lien of the United States, and ordered paid by prior order of this Court.

OPINION OF THE COURT

At the hearing of this cause before said Special Master, an Assistant United States Attorney for the Southern District of Florida, contended that the tax lien of the United States of America, as hereinabove described, is paramount to the mechanics' and materialmens' liens described, citing in support of his contention *U. S. of America* v. *I. J. Collota, et al.*, 79 So. 2d 474, which was appealed to the Supreme Court of the United States and reversed without opinion, as reported in 100 Law Edition 47; *U. S.* v. *Kings County Iron Works*, 224 Fed. 2d 232; *U. S.* v.

Security Trust and Savings Bank, 340 U. S. 47; *U. S. v. Gilbert Associates*, 345 U. S. 361; *U. S. v. New Britain*, 347 U. S. 81.

It is a paradox that the United States conceded that its tax lien is inferior to the mortgage of James O. Lewis, although said mortgage is clearly inferior to the above described claims of lien by virtue of the Laws of Florida and the long established equitable principles.

This Court has considered at length the opinion of the Supreme Court of Florida in the case of *United States* v. *Griffen Moore Lumber Co. Inc.*, 62 So. 2d 589 (Fla. 1953) in which the court held that a materialman's lien, which accrued and was recorded prior to the recording of a Federal Tax Lien for Withholding Taxes and related taxes, had priority over a Federal Tax Lien. In that case the Court was concerned with a Federal Tax Lien which was recorded subsequent to the date of recording of a materialman's lien. Although the lien in that case was recorded prior to the Federal Tax Lien, the Supreme Court of Florida in its opinion did not apparently rely upon the date of actual recording, but repeated its consistant holding that laborers and materialmen have a right to a lien from the first day the material is furnished, which lien is prior to other claims of lien subsequently accruing. In its opinion that Court set forth eloquently its reasoning that Chapter 84, Florida Statutes, should be liberally construed to protect the laborer and materialmen. Parts 2 and 3 of the opinion emphasize that labor and materials expended upon the property result in unjust enrichment of the land and its owner, if the laborer and materialman are not given priority in the enforcement of their claims of lien.

Subsequent to the argument of counsel before said Special Master and the following argument before this Court, this Court was apprised by Counsel for one of the defendants, Harold C. Anderson Lumber Company, Inc., of the holding of the United States Supreme Court in the case of *United States* v. *White Bear Brewing Company, Inc. and Chicago Title and Trust Company, as Trustee, et al.*, the opinion for which was handed down on April 9, 1956. This Court has considered the decision of the Supreme Court of the United States therein, and in particular, the dissenting opinion of Mr. Justice Douglas in which Mr. Justice Harlan concurred. Predicated upon the decision of the Supreme Court of Florida in the Griffen-Moore Lumber Company case, and the dissenting opinion of Mr. Justice Douglas in the above mentioned decision of the United States Supreme Court, this Court is compelled to agree with the principles enunciated by the Supreme Court of Florida and the dissenting opinion of Mr. Justice Douglas. To grant priority to the lien of the United States in the instant case would be to penalize the materialmen's and mechanics' lienors for an indebtedness of which they had no knowledge, which they did not incur, and about which they could not learn by the exercise of due diligence. Aside from the land without improvements, in which E. B. Hulley, the taxpayer, apparently invested only a nominal sum of money, the contention of the United States would result in its collecting its lien from property to which E. B. Hulley did not contribute anything of significance. The United States of America is not seeking to attach its lien to anything of value which E. B. Hulley diverted into the ownership of this property. Under the existing circumstances it is the opinion of this Court that the United States should not occupy a position herein

more favorable than that occupied by E. B. Hulley, but should be confined to his position under the circumstances extant.

In the application of equitable principles of this case, we must examine the precautions which were or might have been taken by the lienors. There was no record of any Federal Tax Lien in Pinellas County until May 16, 1955, and in fact the tax lien is dated May 13, 1955, more than two months after visible commencement of operations. As a result thereof, there was no means by which the lienors could protect their rights to determine whether or not the United States of America claimed any interest in or lien upon the subject property. Moreover, the records of the Bureau of Internal Revenue and the Treasury Department as to the existence of any tax indebtedness were not available to the Public. It is logical to assume that if the lienors had knowledge of the lien of the United States of America, actually or constructively, they would have then conducted themselves in a different manner, would have refused credit and thereby prevented their costly investment of materials and labor in the subject property. But there is no method apparent from the records by which the lienors could protect themselves. The lienors exercised reasonable diligence. In consequence, it is the opinion of the Court that to grant priority to the lien of the United States would produce an inequitable result. Had the United States of America made known its claim in a timely manner by the recording thereof, it would then have been entitled to priority. This Court is compelled to honor the equitable principle of "first in time is first in right", and the unequivocal language of Chapter 84, Florida Statutes, according priority to materialmen and me-

chanics liens effective as of the date of visible commencement of operations.

Counsel for the United States in his argument asserted the theory that the mechanics' and materialmen's liens are inchoate until reduced to judgment or decree. This Court cannot accede to the argument that this theory entitles the lien of the United States to priority. It is manifest that the tax lien of the United States is likewise inchoate until adjudicated.

Accordingly, this Court is of the opinion that honored principles of equity, jurisprudence, and the Laws of Florida, and the principles enunciated by the Supreme Court of Florida, require that said mechanics' and materialmen's liens be accorded priority over the tax lien of the United States.

IT IS THEREUPON ORDERED, ADJUDGED AND DECREED As follows, to-wit:

1. That a reasonable fee be paid to E. B. Ellis, Esq., for services as Special Master, in the sum of $300.00;

2. That Henry Esteva, Esq., Special Master appointed by this Court to sell the subject property, be and he is hereby directed to disburse the sum of Two Thousand Two Hundred Ninety and 23/100 ($2,290.23) Dollars, now in his possession, as follows, to-wit:

(a) E. B. Ellis, Esq	300.00
(b) C. Glow	35.07
(c) Harold C. Anderson Lumber Company, Inc	1235.95
(d) R. Malcolm Whitworth	48.05
(e) Burford Distributing Company	171.40
(f) Albert Sherouse	100.28
(g) John H. Squires	264.82
(h) Jerome P. Dodge	134.68

(NOTE.—Claims disbursed on basis of 37.83261%.)

3. That Item 2–a be disbursed forthwith; that items 2–b, c, d, e, f, g, and h, be disbursed on *August 31, 1956,* or as soon thereafter as possible.

4. That the said tax lien claimed by the United States of America be and it is hereby determined to be inferior to said materialmen's and mechanic's liens for the reasons aforesaid.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 5th day of July A. D. 1956.

/s/ ORVIL L. DAYTON, JR.,
Circuit Judge.

In the Supreme Court of Florida

January Term, A. D. 1958

Wednesday, April 16, A. D. 1958

Case No. 29,157

UNITED STATES OF AMERICA, APPELLANT

vs.

E. B. HULLEY AND BESS M. HULLEY, HIS WIFE; H. P. EFFROSS AND DOROTHY EFFROSS, HIS WIFE; JAMES O. LEWIS; C. GLOW; LOUIS LACKEY AND JOSEPH KATZ, A CO-PARTNERSHIP D/B/A PASADENA MATERIAL CO.; HAROLD C. ANDERSON LUMBER CO., INC., A FLORIDA CORPORATION; R. MALCOLM WHITWORTH, JR.; BURFORD DISTRIBUTING CO., A CORPORATION; ALBERT SHEROUSE; AND JOHN H. SQUIRES, APPELLEES

Opinion filed April 16, 1958

An Appeal from the Circuit Court for Pinellas County.

Orvil L. Dayton, Jr., Judge.

Charles K. Rice, Assistant Attorney General (Washington, D. C.), A. F. Prescott and Robert Coe (Washington, D. C.), and James L. Guilmartin and Richard Kelly, for Appellant.

Robert W. Fisher for Harold C. Anderson Lumber Company, Inc., Appellee.

OPINION

Per Curiam.

Affirmed on authority of *United States* v. *Griffin-Moore Lumber Co., Inc.*, 62 So. 2d 589.

TERRELL, *C. J.*, THOMAS, HOBSON, THORNAL and O'CONNELL, *JJ.*, concur.

AND THEREAFTER, to-wit: On the 16th day of April 1958, the Supreme Court of Florida did enter its order or judgment upon the said Opinion which order or judgment is in words and figures as follows. to-wit:

[Caption omitted]

JUDGMENT

This cause having heretofore been submitted to the Court upon the transcript of the record of the order herein, and briefs and argument of counsel for the respective parties and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and decreed by the Court that the said order of the Circuit Court be and the same is hereby affirmed on authority of United States, vs. Griffin-Moore Lumber Company, Inc., 62 So. 2d. 589; it is further ordered by the Court that the Appellees do have and recover of and from the Appellant their costs by them in this behalf expended, which costs are taxed in the sum of $———, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared was this day ordered to be filed.

Appendix B

Internal Revenue Code of 1939:

Sec. 3670. Property Subject to Lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

Sec. 3671. Period of Lien.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

Sec. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is au-

thorized by the law of the State or Territory in which the property subject to the lien is situated, * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

6 Florida Statutes Annotated:

SEC. 84.02 LIENS ON REAL PROPERTY

A contractor, sub-contractor, materialman or laborer shall, subject to his compliance with the provisions of this chapter and to the limitations of this section and to the provisions of §§ 84.04 and 84.05 and subject to the priorities established by §§ 84.06 and 84.20, have a lien on the real property improved for any money that shall be owing to him for labor or services performed or materials furnished in accordance with his contract and with the direct contract. * * * The aggregate amount of all liens allowed under this chapter for performing labor or services or furnishing materials covered by any certain direct contract shall not exceed the amount of the contract price fixed by said direct contract as diminished by the amount of any money "properly paid" by the owner under such contract, according to the meaning of the words "properly paid" as set out in § 84.05.

SEC. 84.03. ATTACHING DATE AND EXTENT OF LIENS

(1) All liens provided by this chapter shall relate to and take effect from the time of the visible commencement of operations except that, where demolition is involved in the work of improving, liens other than for demolition shall relate to and take effect from the visible commencement of operations excluding demolition and delivery of materials for such demolition.

(2) Except as provided in §§ 84.12 and 84.13, such liens shall extend to, and only to, the

owner's right, title or interest existing at the time of the visible commencement of operations or thereafter acquired in the real property (not exceeding forty acres of land). When an improvement is made by a lessee, in accordance with a contract between such lessee and his lessor, liens shall extend also to the interest of such lessor. If any part of the real property subject to such liens be removed before the discharge thereof, such removal shall not affect the rights of lienors in respect to either the remaining real property or the part so removed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 300

UNITED STATES OF AMERICA
Petitioner,

-v.-

E. B. HULLEY, et al.,
Respondents.

BRIEF IN OPPOSITION TO WRIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 300

UNITED STATES OF AMERICA
Petitioner,

-v.-

E. B. HULLEY, et al.,
Respondents.

BRIEF IN OPPOSITION TO WRIT

PRELIMINARY STATEMENT

The Petitioner, United States, having filed it Brief some 60 days previous to the filing of this Brief in opposition, several cases at the time of the writing of this Brief are pending relating to the subject case and are, therefore, brought to the attention of this Court.

The Petitioner, while it appears that the jurisdictional statement and statutes involved have been correctly presented, has presented their question in such a manner that the Respondents feel that it should be presented in a different light.

I.

QUESTION PRESENTED

Is a mechanic's lien, which by visible commencement of operations accrued prior to the recording of a federal tax lien as construed by State law, superior to a Federal tax lien subsequently recorded?

II.

REASONS FOR DENYING THE WRIT

The Respondents are relying on their property rights as afforded them by the State Statutes of Florida, Sections 84.02 and 84.03, as interpreted by the case of *United States vs. Griffin-Moore Lumber Company, Inc.*, 62 So. 2d 589. The Supreme Court of Florida, per curiam, affirmed the Trial Court of the 6th Judicial Circuit of the State of Florida, in and for Pinellas County, which stated that "the United States of America is not seeking to attach its lien to anything of value which E. B. Hulley diverted into the ownership of this property. Under the existing circumstances, it is the opinion of this Court that the United States should not occupy a position herein more favorable than that occupied by E. B. Hulley . . . ." Mr. Chief Justice Terrell of the Supreme Court of Florida, in the *Griffin-Moore Lumber Company, Inc.*, case, supra, inferred by the language of the Court as follows: "The United States Internal Revenue Code, Section 3672, does not attempt to give the tax liens priority over the materialmen's lien". Indeed, Section 3670 of the Internal Revenue Code of 1939 states that "the amount . . . which being a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person".

Clearly, if E. B. Hulley, in the subject case a contractor, had only the legal title with little or no equity, the United States should not acquire an interest beyond which the contractor is legally entitled. If the contractor, E. B. Hulley, had an interest in funds held in escrow to which he was entitled, certainly the United States should be expected to assert the Federal Lien against that amount. Section 3670, upon which the United States relies, creates no property rights but merely grants to the government whatever property rights the contractor has. This idea was developed in the case of *Aetna Casualty and Surety Company vs. United States,* 4 N.Y. 2d 639, which was decided against the government in the New York Court of Appeals and also presented in *United States vs. Durham Lumber Company,* 257 F 2d 570, 58-2 USTC, par. 9736. This alone, it would seem would be ground enough to deny the writ of certiorari since it is plain that Congress did not intend to assert the Federal Lien against property or properties not actually owned by the taxpayer but owned only in the "technical" sense of ownership. For Congress to do anything to the contrary would result in a grave injustice to the materialman and laborman and deprive him of the benefits of his labor and economic welfare. It is interesting to note that the government in citing the case of *United States vs. New Britain,* 347 U.S. 81, 88, in their Brief, has quoted the Court acknowledging the State's right to decide matters relative to their own State law. While mentioning the case of *United States vs. New Britain,* supra, it is also worth mentioning that Mr. Justice Douglas in his dissenting opinion stated as follows:

> "We said that liens under State law were perfected in the sense that there is nothing more to be done to have an inchoate lien--when the identity of the lienor, the property subject to the lien, and the

amount of the lien are established, then the lienor had an immediate right to enforce his lien 'against the property' The Court apparently holds that under 26 U.S.C. Section 3670, a lien that is specific and inchoate under State law, no matter how diligently enforced, can never prevail against a subsequent Federal Tax Lien short of reducing the lien to final judgment. That is new doctrine not warranted by our decisions and supportable only if the New Britain case were overruled, 100 L. Ed. 871."

The case of *Aquilino vs. United States,* 140 N.Y. 2d 355; case No. 132 (this term), together with the instant case of *United States vs. Hulley,* No. 300, both present questions of the applicability of State or Federal law in determining property a right which is subject to a Federal Tax Lien. While the two cases involved rights of lien claimants under State mechanic's and materialmen's liens, the *Hulley* case is directly contrary to the *Aquilino* case. Apparently, the Respondent's argument to the Court of Appeals of New York was that only Federal law controlled. Although the *Aquilino* and *United States vs. Hulley* cases both involved rights of lien claimants under State mechanic's and materialmen's liens, they are directly contrary in that the Florida Court applied State law whereas the Respondent's argument to the Court of Appeals in that case was that only Federal law controlled.

The most important and significant case, it seems, relative to the rights of the State Courts to apply the State law is the case of *Erie R. R. Co. vs. Tompkins,* 304 U.S. 64. It is now established that this case enters the field of Federal liens. This case decided that the State Property Law was a matter to be determined by the State Courts and, further, that for the Federal

Courts to supervene the State law would be an unconstitutional assumption of powers of the Courts of the United States. The case was first mentioned in the Federal lien litigation in the case of *Commissioner vs. Stern,* 2 L. Ed. 2d 1126. Similarly, the Supreme Court in the case of *United States vs. Bess,* 2 L. Ed. 1135, made the following statement: "Since Section 3670 (1939 Code—now 1954 Code, Section 6321) creates no property rights but merely attaches consequences Federally defined, the rights created under State law, *Fidelity and Deposit Co. vs. New York City Housing Authority,* 241 Federal 2d 142, 144". We must look first to Mr. Bess's right and the policy defined by State law: and, again, it is clear that, as in the instant case of *United States vs. Hulley,* the State definitely has interpreted through its own Courts the matter of property rights as would be expected, and in the present case of *United States vs. Hulley* there are two State Statutes defining the extent of liens on real property, (Section 84.02, 84.03, 6 Florida Statutes annotated).

The case of *United States vs. R. F. Ball Construction Co.,* 355 U.S. 587, was decided in favor of the Federal lien that attached contrary to the surety's interest and there too, the lower Courts apply for local law despite the fact that the Supreme Court decided that the Federal lien superceded the instrument, giving only an inchoate lien which was unperfected at the time the Federal lien attached. However, it is interesting to note that there were four dissents indicating that there is a diversity of opinion as regards the right of the Federal tax liens to supervene the State liens decided under the State property law.

In the case *American National Bank of Jacksonville*, No. 261, October term, 1958, the 5th Circuit held that a tax lien against a husband could not attach to an estate by the entirety. The 5th Circuit held that the State laws of property controlled the cases also similar in many respects to the *Aetna Casualty and Surety Co. vs. United States,* supra, and concerned the same principles as the *Aquilino vs. United States,* No. 132, and the subject case, *United States vs. Hulley* and *Goldstein vs. United States,* 162 Federal Supplement 154, 256, Federal 2d 581, case 215, October term, 1958. There became involved the question of whether the United States can, by a Federal tax lien against the taxpayer, have priority of a lien for attorney's fees in a condemnation case. Although different from the *Aquilino* and *Hulley* cases to some extent there still remains the question of whether or not State property law will be applied as against Federal tax lien. Here, the government successfully contended in the lower Courts that it had a prior right to the funds. However, since the assets of the taxpayer were produced by the services of Mr. Goldstein, it would seem that instead of the taxpayer being penalized that the government is merely out to satisfy the tax lien by property belonging to another and would certainly seem unjustified.

In *Callaway vs. Benton,* 336 U.S. 132, the Supreme Court held that Federal law cannot supervene State law as to property rights; hence, a bankruptcy court was without jurisdiction to compel the sale of a railroad, which was owned by a corporation not subject to the proceedings. This case is certainly in line with the reasoning above given in *Erie R. R. Co. vs. Tompkins,* 304 U.S. 64, and a contrary ruling would be directly in conflict with

the very important decision in the case of *Erie R. R. Co. vs. Tompkins*, 304 U.S. 64, which in fact overruled *Swift vs. Tyson*, 16 Pet 1, 18, 10 L. Ed. 865.

The Respondents bring to the attention of this Court the unusual request instigated by the Petitioner that their petition for a writ of certiorari should be granted and the judgment reversed without oral argument or further Briefs attempting to substantiate their requests by mentioning the disposition of the *Calotta, White Bear,* and *Vorreiter* cases. The Petitioner should be well aware that it is customary to allow oral argument where the petition for certiorari is granted, and almost never is the judgment *reversed* unless there has been the opportunity for oral argument. It would appear that such a disposition of the present case in the light of its importance would be a denial of due process should the Court establish such a precedent.

CONCLUSION

The cases heretofore cited by the Respondents, indicate that the Supreme Court of Florida, by applying the State property law, has decided the present case in accord with numerous applicable decisions of the United States Supreme Court and theretofore already determined by this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari of the United States should be denied and that the requests of the Petitioner that the writ be granted and judgment reversed without oral argument and further Briefs, be also denied.

Respectfully submitted

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